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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 121

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ERNEST NEWTON KALB, APPELLANT,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN  
FEUERSTEIN AND GEORGE O'BRIEN

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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FILED JUNE 19, 1939.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1939.

[fols. 1-9]

**IN CIRCUIT COURT OF WALWORTH COUNTY,  
STATE OF WISCONSIN**

**ERNEST NEWTON KALB, Plaintiff,**

**VS.**

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND  
GEORGE O'BRIEN, Defendants**

**COMPLAINT**

The above named plaintiff by his attorney, J. J. McManamy, alleges and shows to the court:

1. That he is a resident of Walworth County, Wisconsin, and has resided in said county for a great many years prior to the commencement of this action.

2. That the defendants all reside in Walworth County, and that at and during all of the time and times herein mentioned the defendant, Roscoe R. Luce, was Judge of the County Court for Walworth County, and the defendant, George O'Brien, was the sheriff of said county.

3. That at and during all of the time and times herein mentioned the plaintiff was the owner of and was in possession of certain real estate, and that the premises consisted of a farm of 120 acres, part of which constituted the homestead of the plaintiff, said real estate being described as follows:

The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section Fourteen (14) and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of section Fifteen (15), all in Town One (1), North, Range Fifteen (15) east, Walworth County, Wisconsin.

4. That prior to March 7, 1933, the plaintiff and his wife, executed and delivered to the defendants, Henry Feuerstein and Helen Feuerstein, as his wife, a certain mortgage describing the said real estate, said mortgage to secure a debt, [fol. 10] and that prior to March 7, 1933, the debt secured

by the mortgage had matured, and on said date the mortgagee commenced an action in the Court-Court of Walworth County for the foreclosure of the mortgage.

5. That judgment of foreclosure was entered in said action on the 21st day of April, 1933.

6. That by act of the Congress of the United States, Section 75 of an act of the Congress entitled—An Act to Establish a Uniform System of Bankruptcy throughout the United States—approved July 1, 1898, as amended, was further amended on August 28, 1935, 49 Statutes at Large, 942-945, Chap. 792, such amendment being popularly known as the New Frazier-Lemke Act.

7. That on the 2nd day of October, 1934, the plaintiff invoked in his behalf the provisions of the Acts of Congress hereinbefore referred to, by filing in the District court of the United States for the Eastern District of Wisconsin, his petition and schedules as provided by law, and that on the said day an order was made and entered by the District Court of the United States for the Eastern District of Wisconsin, approving his petition as properly filed, and that on the same day the matter was referred to the proper officer for further proceedings in said matter in bankruptcy.

8. That thereafter and on the 27th day of June, 1935, an order was entered by the United States District Court for the Eastern District of Wisconsin, dismissing the plaintiffs petition in so far as it related to Sec. 75 hereinbefore mentioned.

9. That on the 6th day of September, 1935, the plaintiff herein petitioned the District Court of the United States for the Eastern District of Wisconsin for an order vacating the order made in that court on the 27th day of June, 1935, and reinstating his petition filed on the 2nd day of October, 1934. That on the 6th day of September, 1935, the Court made and entered an order vacating its order made on the [fol. 11] 27th day of June, 1935, in said matter, and ordered the reinstatement of the plaintiffs petition as filed on October 2, 1934. That on the 6th day of September, 1935, this plaintiff served on the defendant, Roscoe R. Luce, a certified copy of said order, and such certified copy was filed in the County Court for Walworth County on the 9th day of September, 1935, with the papers filed in the foreclosure proceedings hereinbefore mentioned.

10. That on the 20th day of July, 1935, George O'Brien, as sheriff of Walworth County, conducted a sale of the premises hereinbefore described under the judgment of foreclosure and sale, of the mortgage hereinbefore mentioned, and this plaintiff alleges that the sheriffs sale had not been confirmed by the County Court for Walworth County, Wisconsin, on the 6th day of September, 1935.

11. That subsequent to the sheriffs sale notice was given to this plaintiff that the defendants, Henry Feuerstein and Helen Feuerstein, the mortgagees, would apply to the County Court for Walworth County on the 9th day of September, 1935, for an order confirming the sheriffs report of sale, and at a hearing on that motion on that day the defendant, Roscoe R. Luce, deferred making any order on such application, but that thereafter, and on the 16th day of September, 1935, and unknown to this plaintiff, and without further notice to him, the defendant, Roscoe R. Luce, with full knowledge that the plaintiffs petition filed in the District Court of the United States for the Eastern District of Wisconsin on the 2nd day of October, 1934, had been reinstated by order of that Court, and while the exclusive jurisdiction of the person of the plaintiff and of all of his property, both real and personal, was in the United States District Court for the Eastern District of Wisconsin, the defendant, Roscoe R. Luce, on said day, arbitrarily, wrongfully and unlawfully signed an instrument purporting to confirm the sheriffs report of sale of the premises hereinbefore described, made by the said sheriff on the 20th day [fol. 12] of July, 1935, which report set forth that the premises had been sold to Henry Feuerstein and Helen Feuerstein, attempting thereby to confirm the said sale.

12. That thereafter the defendant, George O'Brien wrongfully and unlawfully executed and delivered to the purchasers at the sale an instrument in the form of a sheriffs deed of sale on foreclosure and that such deed was thereafter recorded in the office of the Register of Deeds for Walworth County, Wisconsin, on the 20th day of September, 1935, in Vol. 240 of Deeds, on page 464 thereof.

13. That on the 16th day of December, 1935, the defendants Henry Feuerstein and Helen Feuerstein, wrongfully and unlawfully, filed in the County Court for Walworth County, a petition praying for an order directing the Clerk

of said court to issue a writ of assistance to the sheriff of said county, and on the same day the defendant, Roscoe R. Luce, wrongfully and unlawfully signed an instrument directing the Clerk of that Court to issue the writ as prayed for in the petition of Henry Feuerstein, and on the said day Harry D. Dunbar, who at that time was Clerk of said Court, wrongfully and unlawfully signed an instrument purporting to direct the defendant, George O'Brien, to eject and remove this plaintiff from the premises hereinbefore described, and to eject and remove Margaret Kalb, the plaintiff's wife, and to eject and remove any person who had come into the possession of said premises or any part thereof, under this plaintiff; and to put the defendant Henry Feuerstein, or his assigns, in full, peaceable and quiet possession of said premises without delay, and this plaintiff is informed and believes that said instrument was delivered to the Defendant, George O'Brien, by the attorneys for the defendants, Henry Feuerstein and Helen Feuerstein.

14. That thereafter and on the 12th day of March, 1936, the defendant, George O'Brien, together with divers other [fol. 13] persons, they being his agents, servants and employees, wrongfully and unlawfully went upon the premises of this plaintiff, and with great force and arms broke into the plaintiff's house and home, and they did cruelly beat and abuse this plaintiff in his house and home, and in the presence of his wife and family, and the said George O'Brien, his agents, servants and employees, with great force and arms, forced this plaintiff, his wife, and family, into automobiles and transported them therefrom, and did wrongfully and unlawfully place in possession of said premises the defendants Henry Feuerstein and Helen Feuerstein, and that the said defendants have been in wrongful possession of said premises from the 12th day of March, 1936.

15. This plaintiff is informed and believes that all of the acts of the defendants done and performed by them subsequent to September 6, 1935, were done and performed in collusion, to effect a plan or scheme to acquire possession of the plaintiff's farm, and all such acts done by the defendants subsequent to September 6, 1935, were done and performed while the plaintiff's petition hereinbefore referred to, was pending in the District Court of the United States for the Eastern District of Wisconsin.

16. That the reasonable value of the use and occupation of the premises hereinbefore described from the 12th day of March, 1936, is reasonably worth the sum of Seven Thousand Dollars (\$7,000.00).

17. That because of the wrongful and unlawful act of the defendants herein mentioned this plaintiff has been damaged in the amount of Seven Thousand Dollars (\$7,000.00).

### Second Cause of Action

As and for a separate and for a second cause of action, this plaintiff restates and realleges paragraphs one to fifteen, both inclusive, as set forth in the first cause of action in the plaintiffs complaint, as though all of such allegations [fol. 14] were fully set forth and repeated in this, the plaintiffs second cause of action.

1. This plaintiff alleges that on the 12th day of March, 1936, the defendant, George O'Brien, and divers other persons, wrongfully and unlawfully entered upon the plaintiff's premises hereinbefore described, and in the presence of the plaintiff's wife and family, broke into the dwelling house, and with force and arms did assault and beat and abuse this plaintiff by striking and hitting him, that as a result of such abuse blood flowed from the plaintiff's head, and the said George O'Brien, together with divers other persons, they being his agents, servants and employees, did force this plaintiff and his family out of their home, and did force them into automobiles and remove this plaintiff and his family from the premises hereinbefore described.

2. This plaintiff is informed and believes that the entering upon his premises by George O'Brien, his agents, servants and employees, and assaulting him and beating him, was under the direction of the other defendants in this action, who wrongfully and unlawfully directed the said George O'Brien to make such entry and wrongfully remove the plaintiff and his family therefrom. That because of the wrongful acts of the defendants in directing George O'Brien to enter upon the plaintiff's premises and because of the wrongful and unlawful act of the defendant George O'Brien, his agents, servants and employees, in making such entry and removing the plaintiff and his family therefrom and because of said defendants assaulting and beating this

plaintiff, he has been damaged in the sum of Two Thousand Dollars (\$2,000.00).

### Third Cause of Action

As and for a separate and for a third cause of action this plaintiff restates and realleges paragraphs one to fifteen [fol. 15] teen, both inclusive, as set forth in the first cause of action in the plaintiff's complaint, as though all of such allegations were fully set forth and repeated in this, the plaintiff's third cause of action.

1. This plaintiff alleges that on the 12th day of March, 1936, the defendant George O'Brien, together with divers other persons, wrongfully and unlawfully restrained this plaintiff of his liberty by taking hold of the plaintiff, and with great force and arms imprisoned him in the County Jail of Walworth County, Wisconsin, wherein the said defendant George O'Brien, by himself, his agents, servants, and employees, by force kept this plaintiff in prison and restrained of his liberty for a considerable period of time.

2. That as a part of such imprisonment the said George O'Brien later, and while still restraining the plaintiff of his liberty, forced the plaintiff to go to the defendant, Roscoe R. Luce, to hear and receive such sentence and abide such direction as said defendant might make and impose on this plaintiff in respect to such confinement and imprisonment.

3. That such confinement and imprisonment was under the direction of the defendants in this action, as this plaintiff is informed and believes.

4. That because of the wrongful acts of the defendants in directing the defendant George O'Brien to arrest this plaintiff and to imprison him, and to restrain him of his liberty the plaintiff has been damaged in the sum of Twenty Thousand Dollars (\$20,000.00).

Wherefore, the plaintiff demands judgment:

(a) On the first cause of action in the sum of Seven Thousand Dollars (\$7,000.00) damages;

(b) On the second cause of action in the sum of Two Thousand Dollars (\$2,000.00) damages;

(c) On the third cause of action in the sum of Twenty Thousand Dollars (\$20,000.00) damages;

[fol. 16] (d) And for his costs and disbursements herein.

J. J. McManamy, Plaintiff's Attorney, 1 West Main Street, Madison, Wisconsin.

*Duty sworn to by Ernest Newton Kalb. Jurat omitted in printing.*

[fol. 17] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER OF HENRY FEUERSTEIN AND HELEN FEUERSTEIN—  
Filed Sept. 22, 1937

Now Comes the above named defendants, Henry Feuerstein and Helen Feuerstein, by Moran & O'Brien, their attorneys, and demur to the complaint of the plaintiff in the above entitled action, and specify as grounds of objection thereto

That it appears from the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

Moran & O'Brien, Attorneys for Defendants Henry Feuerstein and Helen Feuerstein.

Dated September 17, 1937.

[fol. 18] Service admitted Sept. 18, 1937.

J. J. McManamy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 19] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER OF GEORGE O'BRIEN

The defendant, George O'Brien, by Thorson & Seymour, his attorneys, demurs to the complaint of the plaintiff and to each of the three causes of action therein set forth, upon the ground that it appears upon the face thereof;

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united.

Thorson & Seymour, Attorneys for George O'Brien,  
Elkhorn, Wisconsin.

[fol. 20] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER OF ROSCOE R. LUCE—Filed Nov. 1, 1937

The defendant, Roscoe R. Luce, by Thorson & Seymour, his attorneys, demurs to the complaint of the plaintiff and to each of the three causes of action therein set forth, upon the ground that it appears upon the face thereof:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united.

Thorson & Seymour, Attorneys for Roscoe R. Luce,  
Elkhorn, Wisconsin.

[fol. 20½] Due Personal Service of the within demurrer admitted this 15th day of Sept. A. D. 1937.

J. J. McManamy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 21] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

#### NOTICE OF TRIAL

Please Take Notice that the issues raised by the demurrer in the above entitled action will be brought on for trial before the Court at the Court House in the city of Elkhorn, Walworth County, Wisconsin, on the 1st day of November, 1937, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

J. J. McManamy.

To Thorson and Seymour, Elkhorn, Wisconsin, and to Moran and O'Brien, Delavan, Wisconsin, Attorneys for the Defendants.

[fol. 22] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

ORDER ON DEMURRERS—Dec. 21, 1937

This action having been brought to trial on the issues of law joined herein, after hearing Thorson & Seymour, Attorneys, in support of the demurrers filed by the defendants Roscoe R. Luce and George O'Brien, and Moran & O'Brien attorneys, in support of the demurrers filed by the defendants Henry Feuerstein and Helen Feuerstein, and J. J. McManamy, attorney for the plaintiff in opposition:

Ordered, that the general demurrers by the defendants Roscoe R. Luce, Henry Feuerstein and Helen Feuerstein be sustained as to each of the three causes of action and that the general demurrer of the defendant George O'Brien be sustained as to the first and third causes of action, and that said defendants have judgment thereon; but with leave [fols. 23-24] to the plaintiff to amend the complaint within twenty (20) days, without costs.

It is Further Ordered, that the general demurrer of the defendant George O'Brien to the second cause of action be overruled, and that the plaintiff have judgment thereon; but with leave to the defendant George O'Brien to serve and file an answer, within twenty (20) days, without costs.

By the Court.

Edgar V. Werner, Circuit Judge.

[fols. 25-26] IN SUPREME COURT OF WISCONSIN

Walworth Circuit Court

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN and  
GEORGE O'BRIEN, Respondents

Opinion by Chief Justice Rosenberry

JUDGMENT—May 17, 1938

This cause came on to be heard on appeal from the order of the Circuit Court of Walworth County and was argued

by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that upon the appeal of the plaintiff that part of the order of the Circuit Court of Walworth County, appealed from, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Thirty-four and 18/100 (\$134.18) Dollars.

And that upon the motion to review of the defendant George O'Brien, so much of the order of the Circuit Court of Walworth County as overrules the demurrer as to the second cause of action, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings according to law.

[fol. 27]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1938

No. 105

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE et al., Respondents

Appeal from an order of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed in part; reversed in part.

OPINION—Filed May 17, 1938

This action was commenced on September 1, 1937, by Ernest Newton Kalb, plaintiff, against Roscoe R. Luce, County Judge for Walworth county, Henry Feuerstein, Helen Feuerstein and George O'Brien, sheriff, charging the defendants with conspiracy, assault and battery and false imprisonment. There was a demurrer to the complaint and from an order sustaining the demurrer entered December 23, 1937, the plaintiff appeals. All of the parties to the action reside in Walworth county.

Prior to March 7, 1933, the plaintiff and his wife had executed and delivered to the defendants Feuerstein a mortgage to secure an indebtedness. Proceedings were begun

and a judgment of foreclosure was entered on April 21, 1933. On October 2, 1934, the plaintiff filed a petition under the Frasier-Lemke act. No stay of proceedings was granted either in the state or the federal court. On June 27, 1935, [fol. 28] the plaintiff's petition was dismissed by the federal court. The Feuersteins then proceeded in the state court and a sheriff's sale was held July 20, 1935. A sheriff's deed was delivered to the purchaser August 2, 1935, and the sheriff's sale on due notice was confirmed September 16, 1935.

On August 28, 1935, congress passed the second Frazier-Lemke act. On September 6, 1935, plaintiff's petition in the bankruptcy court was reinstated and the order of June 27, 1935, vacated. No stay of the foreclosure proceeding was entered or applied for in either the state or the federal court.

Upon the petition of the plaintiffs in the foreclosure action on December 16, 1935, a writ of assistance fair on its face was delivered to the defendant, George O'Brien, as sheriff. On March 12, 1936, the sheriff ejected the plaintiff from the mortgaged premises.

For his first cause of action the plaintiff charges the defendants with conspiring and colluding together to acquire possession of his farm and seeks to recover damages for being deprived of the use thereof in the sum of \$7,000.

The second cause of action charges the defendant, George O'Brien, with assaulting and beating the plaintiff pursuant to the direction of the other defendants. The third cause of action charges the defendants with false imprisonment and seeks to recover damages therefor.

The demurrer to the complaint was on two grounds: (1st) on the ground that it stated no cause of action against the defendants; and (2d) that several causes of action were improperly joined. The court sustained the demurrer as to the first and third causes of action as to all of the defendants; as to the second cause of action it sustained the demurrer as to Luce and the defendants Feuerstein but held that it stated a good cause of action against the defendant O'Brien for assault and battery and the defendant O'Brien was given twenty days in which to plead.

[fol. 29] ROSENBERRY, C. J.:

Upon this appeal the plaintiff contends that on and after September 6, 1935, when plaintiff's petition in the bank-

ruptcy court was reinstated, the county court for Walworth county was wholly without jurisdiction to proceed to confirm the sale held August 2, 1935, and to execute the judgment of foreclosure. Plaintiff's contention arises under the amendment to sec. 75 of the bankruptcy act enacted by congress August 23, 1925 (11 U. S. C. A., sec. 203 (n), which is printed in the margin.<sup>1</sup>

It is the contention of the plaintiff that this statute is self executing,—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the bankruptcy act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling.

[fol. 30] It has been held by the circuit court of appeals for the ninth district, *Hardt v. Kirkpatrick* (1937), 91 F. (2d) 875, that a stay provided for by sec. 75 (o) and sec. 75 (s) is a judicial stay and not a statutory stay. While the plaintiff in this action claims his rights under sec. 75 (n) the

<sup>1</sup>“(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended (this section), shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

“In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section.” 11 U. S. C. A. sec. 203 (n).

same reasoning applied in the Hardt case leads to the same conclusion in this case: Under the amendment to sec. 75 of the bankruptcy act, the federal courts have consistently conformed to this conclusion. See cases cited 11 U. S. C. A., p. 1004, under title "Foreclosure of mortgage". See *In re Arend* (D. C. Mich., 1934), 8 F. Supp. 211. The circuit court of appeals, seventh circuit, held *In Re Lowmon—La Fayette Life Ins. Co. v. Lowmon* (1935), 79 F. (2d) 887, that the bankruptcy act could not be so construed as to extend the period of redemption which had expired according to the provisions of a state statute and if so construed it would be unconstitutional.

The defendant O'Brien seeks a review of that part of the order which holds that a cause of action for assault and battery is stated as to him. There is no allegation in the second cause of action that the defendant O'Brien used any excessive force or that he used more force than was reasonably necessary to put the defendants Feuersteins in possession of the mortgaged premises and to execute the writ of assistance. It is claimed that the acts of O'Brien were wrongful because without warrant in law. This contention is based upon the same grounds upon which the other contentions were made,—that is, that the court was wholly without jurisdiction to confirm the sale or to issue the writ of assistance. If as we hold the writ of assistance was validly issued then the allegations contained in the second contention with respect to assault and battery are insufficient.

By the Court.—Upon the appeal of the plaintiff that part of the order appealed from is affirmed. Upon motion to review of the defendant O'Brien, so much of the order as overrules the demurrer as to the second cause of action is reversed and cause remanded for further proceedings according to law.

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[fols. 33-34] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed June 2, 1938

The appellant moves for a rehearing in this case on the only question discussed in the opinion of the Court.

Dated: June 2, 1938.

J. J. McManamy, Attorney for Appellant.

[File endorsement omitted.]

[fols. 35-36] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 29, 1938

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fol. 37] IN SUPREME COURT OF WISCONSIN

[File endorsement omitted]

[Title omitted]

OPINION ON MOTION FOR REHEARING—Filed June 27, 1938

ROSENBERY, C. J.

On Motion for rehearing.. The appellant has moved for a rehearing upon the authority of James M. Wright, Petitioner, v. Union Central Life Insurance Company.—U. S. decided May 31, 1938. That case does not deal with and so far as we can see, has no bearing upon the question involved in this case and in the companion case. It holds the provisions considered constitutional. The plaintiff proceeds upon the theory that the order of the county court for Walworth county confirming the sale was without jurisdiction because after the plaintiff in this action had filed his petition under section 75 of the bankruptcy act as amended on August 28, 1935, the state court was without jurisdiction to proceed. There was no motion for a stay either in the federal court or in the state court, the plaintiff's theory being that the filing of the petition divested the state court of all jurisdiction to proceed in the action then pending before it.

[fol. 38] It is considered that plaintiff's position is not well taken. It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already

been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth county had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.

We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

We adhere to our former determination that the provisions of sec. 75 were not intended to provide for a statutory stay but to create rights when properly asserted are grounds for a judicial stay.

[fols. 39-73] Nor do we find anything in the case of *Adair v. Bank of America National Trust and Savings Association*, — U. S. —, decided February 28, 1938, to the contrary. While it is stated in that opinion that sec. 75 provides that the filing of the petition shall effect a stay, the cases cited in support of the proposition are cases relating to the power of a court of bankruptcy to stay proceedings and it is held that courts of bankruptcy have that power. The court said:

"In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) for the exercise by the court of 'such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority,

in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."

See Wright v. Vinton Branch (1937), 300 U. S. 440, at 466.

By the Court.—Motion denied without costs.

[fols. 1-2] IN CIRCUIT COURT OF WALWORTH COUNTY, STATE  
OF WISCONSIN

ERNEST NEWTON KALB, Plaintiff,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN  
and GEORGE O'BRIEN, Defendants

NOTICE OF APPEAL—Filed in Supreme Court, Feb. 11, 1939

Please Take Notice That the plaintiff, Ernest Newton Kalb, above named, hereby appeals to the Supreme Court of the State of Wisconsin from a judgment rendered by the above named Court herein, entered on the 29th day of December, 1938, in favor of the defendants and against the plaintiff dismissing the plaintiff's complaint and assessing costs against the plaintiff and from the whole of such judgment.

Dated this 24th day of January, 1939.

J. J. McManamy, Plaintiff's Attorney.

To: Thorson & Seymour, Attorneys for Roscoe R. Luce, and George O'Brien.

To: Moran & O'Brien, Attorneys for Henry Feuerstein and Helen Feuerstein.

To: Harry Dunbar, Clerk Circuit Court, Walworth County, Wisconsin.

[fol. 3] Bond on Appeal for \$250.00, filed Feb. 11, 1939.  
Omitted in printing.

[fols. 4-6] Affidavits of service of notice of appeal and bond omitted in printing.

[fol. 7] Harry D. Dunbar, filed Jan. 27, 1939, Clerk of Courts.

[fol. 8] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

**ORDER SUSTAINING DEMURRER OF DEFENDANT, GEORGE O'BRIEN, TO SECOND CAUSE OF ACTION PURSUANT TO DIRECTION OF SUPREME COURT—Filed Dec. 1, 1938**

This action having been tried at the September term, 1937, of this Court before the Court on the issues of law joined herein, and the Court on December 21, 1937 having ordered that the general demurrers of the defendants, Roscoe R. Luce, Henry Feuerstein and Helen Feuerstein be sustained as to each of the three causes of action and that the general demurrer of the defendant, George O'Brien, be sustained as to the first and third causes of action and that the defendants have judgment thereon, but with leave to the plaintiff to amend within twenty (20) days, and having overruled the general demurrer of the defendant, George O'Brien to the second cause of action and directing that plaintiff have judgment thereon but with leave to the defendant, George O'Brien to answer within twenty (20) days; and the plaintiff having duly appealed from the portion of said order sustaining the demurrers to the Supreme Court and the defendant, George O'Brien, having served [fol. 9] Notice of Motion to Review and the order overruling his demurrer to the second cause of action; and the Supreme Court by decision filed May 17, 1938 having affirmed that portion of the order sustaining the demurrers and having reversed that portion of the order overruling the demurrer of the defendant, George O'Brien, to the second cause of action and said Court, by decision filed June 29, 1938 having denied plaintiff's motion for rehearing; and the plaintiff having appealed from said decision to the Supreme Court of the United States and that Court, on October 24, 1938, having dismissed said appeal; and the record in this cause having been duly remitted by the United States Supreme Court to the Supreme Court of Wisconsin and by it to this Court, with directions that judgment be rendered in favor of the defendants, in accordance with its mandate.

Now, On Motion of Thorson & Seymour, attorneys for the defendant, George O'Brien,

It is Ordered, that that portion of the order herein made December 21, 1937, overruling the general demurrer of the

defendant, George O'Brien, to the second cause of action and directing that plaintiff have judgment thereon, be and the same hereby is vacated, pursuant to direction of the Supreme Court.

It is Further Ordered, pursuant to the mandate of the Supreme Court, that the general demurrer of the defendant, George O'Brien to the second cause of action be sustained and that he have judgment thereon; but with leave to the plaintiff to serve and file an amended complaint within twenty (20) days, upon payment of Ten (\$10.00) dollars costs.

By the Court.

Edgar V. Werner, Circuit Judge.

Dated November 30, 1938.

[fol. 9a]

[File endorsement omitted]

[fol. 10] IN CIRCUIT COURT OF WALWORTH COUNTY

ERNEST NEWTON KALB, Plaintiff,

vs.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN  
and GEORGE O'BRIEN, Defendants

JUDGMENT—Filed Dec. 29, 1938

An order having been entered in this action on December 21, 1937, sustaining the demurrers of the defendants, Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein, to each of the three causes of action of the complaint herein, and sustaining the demurrer of the defendant, George O'Brien to the first and third causes of action of the complaint and that the defendants have judgment thereon, but with leave to the plaintiff to amend within twenty days, and having overruled the demurrer of the defendant, George O'Brien, to the second cause of action, and directing that plaintiff have judgment thereon, but with leave to the defendant, George O'Brien to answer within twenty days; and the plaintiff having duly appealed from that portion of the order sustaining the demurrers to the Supreme Court, and the defendant, George O'Brien having served notice of

motion to review the order overruling his demurrer to the second cause of action; and the Supreme Court, by decision [fol. 11] filed May 17, 1938, having affirmed that portion of the order sustaining the demurrers, and having reversed that portion of the order overruling the demurrer of the defendant, George O'Brien, to the second cause of action, and said Court, by decision filed June 29, 1938, having denied plaintiff's motion for rehearing; and the plaintiff having appealed from said decision to the Supreme Court of the United States, and that Court, on October 24, 1938, having dismissed said appeal; and an order having been entered herein, after remittitur, pursuant to direction of the Supreme Court, vacating that portion of the order made December 21, 1937, overruling the demurrer of the defendant, George O'Brien, to the second cause of action, and an order having been entered November 30, 1938, sustaining the demurrer of the defendant, George O'Brien to the second cause of action and directing that he have judgment thereon but with leave to the plaintiff to serve and file an amended complaint within twenty days, upon payment of costs, and notice of the entry of said order having been served on December 2, 1938, and proof of service being on file, and more than twenty days having elapsed since such service and the plaintiff having failed to amend his complaint as said order allowed and having indicated that he desires judgment entered on the orders and that he does not desire to amend;

Now, On Motion of Thorson & Seymour, attorneys for the defendants, Roscoe R. Luce and George O'Brien, and on motion of Moran & O'Brien, attorneys for the defendants, Henry Feuerstein and Helen Feuerstein,

It is Ordered and Adjudged that the complaint herein be, and the same is, hereby dismissed, and that the defendants, [fol. 12] Roscoe R. Luce and George O'Brien, have and recover their costs of the plaintiff, taxed at One Hundred Nine and 75/100 dollars, and the defendants, Henry Feuerstein and Helen Feuerstein, have and recover their costs of the plaintiff, taxed at One Hundred Three and 95/100 dollars.

By the Court, Edgar V. Werner, Circuit Judge.

December 27, 1938.

[fol. 13] [File endorsement omitted.]

[fol. 14]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

ERNEST NEWTON KALB, Appellant,

VS.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN,  
and GEORGE O'BRIEN, Respondents

NOTICE OF MOTION TO ADVANCE, ETC.—Filed March 25, 1939

Please Take Notice that on the 11th day of April, 1939, at the opening of Court on that day or as soon thereafter as counsel can be heard the appellant will move for an order:

- (a) To advance the cause on the calendar, and
- (b) That the cause may be decided by the Court without the filing of printed case and without further notice to the parties.

Dated this 20th day of March, 1939.

James J. McManamy, Attorney for Appellant.

To: Thorson & Seymour, Attorneys for Respondents,  
Roscoe R. Luce and George O'Brien.To: Moran & O'Brien, Attorneys for Respondent, Henry  
Feuerstein and Helen Feuerstein.

Admission of service admitted this 21 day of March, 1939.

Thorson & Seymour, Attorney for Respondents Roscoe R. Luce and George O'Brien. J. Arthur Moran for Moran & O'Brien, Attorneys for Respondent Henry and Helen Feuerstein.

[fol. 15]

AFFIDAVIT OF JAMES J. McMANAMY

STATE OF WISCONSIN,  
County of Dane, ss:

James J. McManamy, being first duly sworn says that he is the attorney for the appellant in this action and makes this affidavit in his behalf. That this cause was before this Court on April 12, 1938, on an appeal from an order sustaining a demurrer to the complaint and the appeal was

decided by this Court on June 29, 1938 (228 Wis. 519), affirming the order sustaining the demurrer, as to the respondents Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein, reversing the order as to the respondent George O'Brien.

That thereafter an appeal was taken to the Supreme Court of the United States from the judgment of this Court. That the appeal was dismissed because final judgment had not been entered by the trial court.

That thereafter the record was remitted to the Circuit Court for Walworth County and judgment dismissing the complaint was entered in that Court.

That an appeal from the judgment so dismissing the complaint is now pending in this Court and the appellant is desirous of having the matter determined by this Court [fols. 16-17] at the earliest date possible, and by his attorney James J. McManamy makes this affidavit bringing these facts to the attention of the Court to the end:

(a) An order may be made advancing said cause on the calendar, and

(b) that the cause may be decided by this Court without the filing of printed case and without further notice to the parties.

James J. McManamy.

Subscribed and sworn to before me this 20 day of March, 1939.

Mabel Graves, Notary Public, Dane County, Wis.  
(Seal.)

[fol. 18] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION TO AMEND FORMER OPINION—April 11, 1939

And now at this day came the said respondents, by their attorney, and moved the court now here to amend the former opinion by deciding two additional questions, which motion having been argued by A. T. Thorson, Esq., and J. Arthur Moran, Esq., for the said respondents, and by

J. J. McManamy, Esq., for the said appellant, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that said motion be, and the same is hereby, denied.

[fol. 19] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR JUDGMENT, ETC.—April 11, 1939

And now at this day came the said appellant, by his attorney, and moved the court now here to place this cause on the calendar and assign same for argument on the May call, and without printed case and briefs, and for judgment on the record; which motion having been argued by J. J. McManamy, Esq., for the said appellant, and by A. T. Thorson, Esq., and J. Arthur Moran, Esq., for the said respondents, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that the motion for judgment on the record, be, and the same is hereby, granted.

[fols. 20-21] IN SUPREME COURT OF WISCONSIN

ERNEST NEWTON KALB, Appellant,

VS.

ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN AND  
GEORGE O'BRIEN, Respondents

JUDGMENT—April 20, 1939

This cause came on to be heard on appeal from the judgment of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Walworth County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Twenty-eight and 50/100 (\$28.50) Dollars.

[fol. 22] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM 1939

ERNEST NEWTON KALB, Appellant,

vs.

ROSCOE R. LUCE ET AL., Respondents

Appeal from a judgment of the circuit court for Walworth county.

Edgar V. Werner, Circuit Judge

Affirmed.

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 29, 1938. From that judgment the plaintiff appeals.

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OPINION—Filed April 20, 1939

[fol. 23] By the Court:

The issues raised upon this appeal were considered by this Court in *Kalb v. Luce* (1938), 228 Wis. 519, 279 N. W. 685. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

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[fol. 24] IN SUPREME COURT OF WISCONSIN

[Title omitted]

[File endorsement omitted]

ORDER ALLOWING APPEAL—Filed May 19, 1939

The petition of Ernest Newton Kalb, appellant in the above entitled matter, for an appeal therein to the Supreme

Court of the United States from the Supreme Court of the State of Wisconsin, and the Assignment of Errors filed herewith and the record of said cause having been considered:

It Is Ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin as prayed in said petition and the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the records and proceedings in the above entitled cause as shall be designated by precept of the parties and transmit the same to the Supreme Court of the United States within thirty days from date hereof.

It Is Further Ordered: That the appellant will execute his undertaking in the sum of five hundred Dollars conditioned that he shall prosecute said appeal to effect and if appellant shall fail to make his plea good to answer all damages and costs of the respondents.

It Is Further Ordered: That the appeal herein shall operate as a supersedeas.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin.

May 19th, 1939.

[fol. 25] IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL—Filed May 19, 1939

The petitioner, Ernest Newton Kalb, respectfully represents that he is a citizen of the United States and a resident of the State of Wisconsin, and considering himself aggrieved by the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause wherein he is the appellant, hereby prays that an appeal be allowed to the Supreme Court of the United States from the decree entered in said cause by the Supreme Court of the State of Wisconsin on the 20th day of April, 1939, affirming the judgment of the Circuit Court for Walworth County, Wisconsin, entered December 29th, 1938, dismissing the complaint.

## STATEMENT

The case is one in which the validity of the statute of the United States *id* drawn in question, to-wit, 49 Statutes at Large 943, Chapter 792, approved August 28, 1935, amending Section 75 (n) of the Bankruptcy Act and known as the new Frazier-Lemke Act wherein the Supreme Court of the State of Wisconsin decided a federal question of substance not theretofore determined by the Supreme Court of the United States. That the part of the said statute under which the appellant asserts his rights relates to the exclusive [fol. 26] jurisdiction of the federal court of the person of the petitioner and all of his property after the filing of his petition pursuant to said act. The appellant asserts that his rights under this statute have been denied because the Supreme Court of the State of Wisconsin has decided that this statute of itself does not effect a stay of proceedings in a mortgage foreclosure pending in a state court at the time the appellant filed his petition under Section 75 (n) of the Bankruptcy Act, thereby drawing in question the validity of a federal statute and deciding in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

## MANNER IN WHICH THE QUESTION AROSE OF THE TRIAL COURT

The complaint sets up that the appellant is a farmer, and that on the 2nd day of October, 1934, he filed his petition in the District Court of the United States for the Eastern District of Wisconsin under Section 75 (n) of the Bankruptcy Act as amended, that foreclosure of a mortgage on his farm was pending in a county court at that time. That his petition for relief under the Bankruptcy Act was dismissed on the 27th day of June, 1935. That after the amendment of Section 75 approved August 28, 1935, to-wit, on the 6th day of September, 1935, the appellant's petition was reinstated in the District Court of the United States and on that day a certified copy of such order of reinstatement was served upon the Judge of the Court in which the mortgage foreclosure was pending. That on the 16th day of September, 1935, the said Judge entered an order in his court confirming a sheriff's report of sale theretofore had in the foreclosure proceedings and directed the delivery of a deed thereunder to the purchaser. The appellant asserts that the county court was wholly without jurisdiction to confirm

the sheriff's report of sale on September 16, 1935, and was without jurisdiction to direct the delivery of a deed by the sheriff and that such order is wholly void.

[fol. 27] The defendants interposed a demurrer to the complaint which was sustained by the Circuit Court for Walworth County and on appeal to the Supreme Court of Wisconsin the order of the trial court sustaining the demurrer was affirmed; and on December 29, 1938, judgment was entered in the Circuit Court dismissing the complaint.

#### ASSIGNMENT OF ERROR

(a) The Court erred in its judgment and decree in directing that the order of the Circuit Court for Walworth County sustaining the demurrer of Roscoe R. Luce, Henry Feuerstein, and Helen Feuerstein be affirmed.

(b) The Court erred in its judgment and decree in directing that the order of the Circuit Court for Walworth County overruling the demurrer of George O'Brien be reversed.

(c) The Court erred in its judgment and decree in affirming the judgment of the Circuit Court dismissing the complaint.

#### PRAYER FOR REVERSAL

For which errors the appellant above, Ernest Newton Kalb, prays that the said judgment of the Supreme Court of the State of Wisconsin made on the 20th day of April, 1939, in the above entitled cause be reversed and judgment ordered in favor of this appellant, and that an authenticated transcript of the proceedings in this court may be transmitted to the Supreme Court of the United States, and that an order be entered fixing the amount of the bond to be required of the appellant in connection with this petition for appeal.

Ernest Newton Kalb, Petitioner.

[fol. 28] *Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.*

[fols. 29-33] [File endorsement omitted.]

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[fols. 34-35] Bond on appeal for \$500.00, filed May 25, 1939, omitted in printing.

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[fols. 36-41] Citation, in usual form, showing service on W. L. Seymour et al., filed May 31, 1939, omitted in printing.

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[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

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[fols. 43-46] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 374

**ERNEST NEWTON KALB, Appellant,**

vs.

**ROSCOE R. LUCE, HENRY FEUERSTEIN, HELEN FEUERSTEIN,  
and GEORGE O'BRIEN**

**ORDER AS TO RECORD ON FORMER APPEAL—Filed April 29,  
1939**

On the Petition hereto annexed:

It Is Ordered: That the transcript of the record of the Supreme Court of the State of Wisconsin now on file in this Court may be used by the appellant in so far as the same is applicable on an appeal to this Court from the judgment entered in the Supreme Court of the State of Wisconsin on April 20th, 1939.

Dated this 29 day of April, 1939.

Charles E. Hughes, Chief Justice.

[fol. 46½] [File endorsement omitted.]

[fol. 47] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June  
19, 1939

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point I. That the Supreme Court of Wisconsin erred in finding and holding that the order of the Circuit Court for Walworth County:

(a) Sustaining the demurrer of Roscoe R. Luce, and Henry Feuerstein and Helen Feuerstein to the complaint be affirmed;

(b) and in finding and holding that the order sustaining the demurrer of George O'Brien to the first and third cause of action be affirmed;

(c) and that the order overruling the demurrer of the defendant George O'Brien as to the third cause of action be reversed.

Point II. That the Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the complaint.

[fol. 48] And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of Paper:

Plea to Wisconsin Supreme Court

Order Circuit Court allowing to amend complaint.

\* Affidavit of default and proof of service.

Judgment dismissing the complaint.

Notice of appeal to Supreme Court of Wisconsin and proof of service.

Undertaking on appeal and proof of service.

\* Notice motion to advance cause for argument and decision and proof of service.

\* Not in original record: See Pages 7 & 8, Kalb v. Feuerstein.

Order granting motion to advance cause for decision.  
 Order Supreme Court denying defendants motion to modify former opinion.

Opinion of Supreme Court of Wisconsin.

Order allowing appeal to the United States Supreme Court and affidavit.

Separate statement for jurisdiction.

Citation and proof of service.

Præcipe and proof of service.

Undertaking on appeal to Supreme Court of the United States.

William Lemke, Fargo, North Dakota, Appellants Attorney. James J. McManamy, Madison, Wisconsin, Appellants Attorney.

[fol. 49]      [File endorsement omitted]

Endorsed on cover: Enter William Lemke. File No. 43,528. Wisconsin Supreme Court.: Term No. 121. Ernest Newton Kalb, Appellant, vs. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein and George O'Brien. Filed June 19, 1939. Term No. 121 O. T. 1939.

(4302)